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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re PAUL CROWDER	G043491
on Habeas Corpus.	(Super. Ct. No. M-12728)
	O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed as modified.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Julie L. Garland, Assistant Attorney General, Ryan Schneider, Julie A. Malone and Charles Chung, Deputy Attorneys General, for Appellant Board of Parole Hearings.

Rudy Kraft for Respondent Paul Crowder.

* * *

The Board of Parole Hearings (Board) appeals from an order granting Paul Crowder's petition for a writ of habeas corpus. Crowder had challenged the finding of the Board that he is unsuitable for parole.

We agree the Board's parole denial was not supported by even some evidence. No evidence reasonably suggested the 20-year-old commitment offense — in which then 19-year-old Crowder, after drinking all night, shot his friend — or Crowder's teenaged turmoil — dropping out of school and turning to alcohol after losing his father at 15 — create a risk of current dangerousness. Nor does Crowder's decision to appeal his conviction or his insistence he never meant to shoot the victim show he is still dangerous. As we noted when affirming his conviction, "one can be guilty of a [second degree] murder based on implied malice with every intention that the victim *not* be harmed." (*People v. Crowder* (G011743, G017602, May 30, 1996) [nonpub. opn.] (*Crowder*).)

But we must modify the court's remedy. The court ordered the Board to grant parole "unless new evidence" shows Crowder is unsuitable for parole. While case law supported the order at that time, later the California Supreme Court held similar orders "impermissibly impair[] the Board's exercise of its inherent discretion to decide parole matters." (*In re Prather* (2010) 50 Cal.4th 238, 255-256 (*Prather*).) We thus affirm the order issuing a writ of habeas corpus, but modify it to require the Board to conduct a new hearing "in accordance with due process of law." (*Id*. at p. 258.)

FACTS

We set forth some facts surrounding Crowder's offense when we affirmed his conviction in 1996. (See *Crowder*, *supra*, G011743, G017602.) He accompanied

friends to a high school prom after-party in 1991. He brought two guns. Throughout the night, he drank alcohol, brandished a handgun, and threatened others. Toward morning, Crowder began arguing with partygoers. He said about two of them, "'I hate them, fuck them, they're just dising me . . . I hate them, *I want to kill them*.'" "'Those fucking bitches. I hate those bitches. I just want to kill them all.'" Crowder later entered the doorway of a dark room and fired the handgun, killing 17-year-old Berlyn Cosman while she slept. (*Ibid*.)

A key appellate issue was whether sufficient evidence supported the "conviction of second degree murder on an implied malice theory." (*Crowder*, *supra*, G011743, G017602.) Crowder had "testified he tripped entering [the] room . . . , the gun discharged as a result, and he had no intention of harming anyone." He also asserted "his projected blood alcohol at the time of the shooting was" 0.196 percent. We held Crowder "displayed a conscious disregard for the safety of the other celebrants throughout the evening. . . . The jury had plenty of reasons to reject the claim of accident and find implied malice, i.e., that the defendant committed an inherently dangerous act with conscious disregard of the potentially fatal consequences." We noted in a related context, "one can be guilty of a murder based on implied malice with every intention that the victim *not* be harmed." (*Ibid*.)

At the December 2008 parole hearing, psychological evaluations showed Crowder represented a "'below average'" or "low" risk of future violence. A 2008 evaluation placed him in the "very low range of psychopathy" with "no indication of any mental illness . . . ." Crowder had the "'increased maturity'" and "'insight'" to confront his offense and its causes — "'a tragic combination of unresolved depression, anger at the loss of his father alongside the added factors of alcohol and gun play based on a

misguided attitude of "what [he] thought a man was supposed to look like."'" Crowder required no further therapy. And Crowder had maintained "an extended period of sobriety" and would "likely be able to refrain from drugs and alcohol use if granted release."

The record showed Crowder settled into a stable prison life. He had committed to Alcoholics Anonymous and Narcotics Anonymous, taken vocational training, held prison jobs, passed the GED test, and had offers to live with family and friends who would support his sobriety. He had no major disciplinary issues in prison: his record stated, "'Disciplinary free since 1993.'" He counseled juvenile offenders through the Straight Life program and stated: "I'm going to continue working with kids because . . . I need to stop the next Paul Crowder from killing the next [B]erlyn Cosman, and that's the only way I can do it."

Crowder testified his life fell apart when he was 15 years old and his father died, leading him to drop out of high school and help support his mother and two brothers. He bought the guns in an effort to be a "tough guy" and a "bully" — he "was an angry kid [who] didn't know how to deal with it, and [he] had a distorted view of what a man was back then." Crowder had just turned 19 when he shot the victim. She was "a good friend" of his (he dated her friend) and was "the best person that [he had] ever met . . . ." She "deserved the whole world and anything that she wanted and [he] took it all away from her." He did not intend to hurt her; he simply tripped while holding the gun.

Crowder thus accepted his guilt for second degree murder. He stated, "looking back at myself at who I was[,] carrying a gun and drinking . . . what could I have thought was going to happen?" But he maintained the trial judge was "kind of cold

and calculating" and "almost seemed mean." He thought the judge "made an example out of [him]." But that was "understandable" because Crowder conceded he "was a bad person" who "made bad decisions." He stated, "they made an example [out] of me and I hope it worked. I hope somebody saw that and it helps someone else."

The victim's father asked the Board to grant parole. He had traded letters with Crowder for years, after Crowder sent him a written apology. The father wrote, "I am under the opinion that [Crowder] does not seek to harm anyone. I further believe that the delusions of his ill years which ultimately led to his grievous crime for the most part have been dispelled."

The Board denied parole, relying on three factors showing unsuitability.[1] First, the commitment offense "was committed in an especially cruel manner," in that Crowder had threatened others, acted "dispassionate[ly]," and had an "inexplicable" motive. Second, Crowder had an "unstable social history" in that he was "a high school drop out" and had "the issue[s] of alcohol abuse and the carrying of weapons . . . ." Third, Crowder's "[p]resent and past mental state and attitude toward the crime" shows he "tend[s] to minimize [his] conduct." He called the shooting "an accident[] until recently where [he] now describe[s] it as unintentional," and he "continue[s] to maintain that it's unintentional although there was a pattern of disregard for the safety of others . . . ." He also "tend[s] to blame others[,] specifically in [his] appeal [he] blame[s] the lack of due process, the ineffective counsel and a cold judge."

The court granted the ensuing petition for a writ of habeas corpus. It found Crowder's commitment offense and social history were "'immutable fact[s]'" not

[1] The Attorney General contends the Board also relied upon Crowder's disciplinary record in denying parole. But the Board mentioned that record while reciting factors favoring parole. We concur with the court's finding that the Board "viewed [Crowder's] prison discipline record as 'positive.'"

probative of his current dangerousness. It noted Crowder was 19 and "drunk" when he committed the offense "nearly 20 years ago." His social history was "based on circumstances from [his] teenage years, 20 years ago. When [Crowder] was 15, his father died. [He] dropped out of high school one semester short of graduation and turned to alcohol use. He also acquired a gun and a shotgun at that same time. [Crowder] has now been in self-help and therapy for 20 years. . . . He has been involved in AA for a lengthy period of time. He has not abused alcohol since 1991."

The court also found "[Crowder's] 'attitude' here simply is not evidence of current dangerousness. [Crowder's] version of the crime has never changed. He testified at his trial that he tripped and the gun 'went off.' [Citation.] . . . . [Crowder's] version was not implausible; it was simply not what the jury found. [Citation.] The [Board] criticized [Crowder's] for first describing the killing as an 'accident' and later calling it 'unintentional.' But the issue of what distinguishes intent, specific intent, implied malice, inherently dangerous acts, conscious disregard for the safety of others, gross negligence, ordinary negligence, and recklessness is an extremely intricate subject on which reasonable legal scholars may disagree. [Citation.] A mischaracterization of his legal level of culpability does not amount to some evidence that [Crowder] is currently dangerous to society, particularly where [Crowder's] psychological examinations, and indeed his own statements, indicate that he has taken responsibility for and achieved 'insight' into his life crime."

DISCUSSION

No Evidence Supports the Board's Decision Denying Parole

The Board must set a parole release date "unless it determines that the gravity of the current convicted offense or offenses . . . is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." (Pen. Code, § 3041, subd. (b).) "[A] life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).) The Board may consider many factors in determining whether the prisoner is suitable or unsuitable for parole.[2] (*Id.*, subds. (c), (d).)

No factor supplants the Board's basic duty to assess whether the prisoner is currently dangerous. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 (*Lawrence*).) "[T]he fundamental consideration in parole decisions is public safety. [Citations], . . . the core determination of 'public safety' . . . involves an assessment of an inmate's *current* dangerousness." (*Ibid*.) "[C]urrent dangerousness is the fundamental and overriding [parole] question" (*id*. at p. 1213), and so "current dangerousness (rather than the mere presence of a statutory unsuitability factor) is the focus of the parole decision" (*Id*. at p.

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[2] Circumstances tending to show parole suitability are: (1) the lack of a juvenile criminal record; (2) a stable social history; (3) signs of remorse; (4) the suffering of significant stress at the time of the offense; (5) the suffering from battered woman syndrome at the time of the offense; (6) the lack of any other criminal history; (7) reduced probability of recidivism due to age; (8) a realistic parole plan or marketable skills; and (9) good behavior in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

Circumstances tending to show parole unsuitability are: (1) a commitment offense committed "in an especially heinous, atrocious or cruel manner"; (2) a previous record of violence; (3) an unstable social history; (4) previous sadistic sexual offenses; (5) "a lengthy history of severe mental problems"; and (6) "serious misconduct in prison or jail." (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

1210). Thus, rather than merely reciting unsuitability factors, the Board must provide "reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision — the determination of current dangerousness." (*Ibid*.)

The Board's discretion is not boundless; it is subject to judicial review. The court's "'review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision.'" (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260-1261.) "This standard is unquestionably deferential, but certainly it is not toothless." (*Lawrence*, *supra*, 44 Cal.4th at p. 1210.)

Here, the Attorney General presents no "rational nexus" between the Board's three unsuitability factors and its conclusion that Crowder is currently dangerous. (*Lawrence*, *supra*, 44 Cal.4th at p. 1210.)

The commitment offense fails to show Crowder is currently dangerous. First, no evidence shows the commitment offense was especially heinous for a second degree murder. Crowder surely bears the blame for his threats and drunken misconduct before the shooting, as well as for brandishing a loaded handgun while drunk. But such a conscious disregard for human life is a hallmark of implied malice. "[*M*]*alice* may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life." (*People v. Watson* (1981) 30 Cal.3d 290, 296.) Crowder's conscious disregard for the victim's life amply justified his second degree murder conviction, but it does not set it apart from other such murders — all of which are awful.

Second, even if the commitment offense were especially heinous, "it is now apparent that the aggravated nature of the commitment offense does not, in every case, provide some evidence that the inmate remains a current threat to public safety."

(*Lawrence*, *supra*, 44 Cal.4th at p. 1218.) "At some point . . . when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Id* . at p. 1219.) After nearly 20 years of sobriety, with "increased maturity" and "insight" into the commitment offense, and with a "low" risk of recidivism or future violence, nothing about the tragic commitment offense reasonably suggests Crowder will lapse into the anger and alcohol abuse he indulged as a teen.

Nor does Crowder's unstable social history show he is currently dangerous. That history lasted four years: it started when Crowder was 15 and his father died; continued as he dropped out of school to support his family, began abusing alcohol, and started carrying guns; and ended when he was turned 19 and shot the victim in 1991. These years were plagued with poor choices, as Crowder freely concedes. But they were 20 years ago. Crowder has shown a commitment to addressing and resolving his underlying anger, depression, and alcohol abuse. As noted, the psychological evaluations state he is at a low risk of abusing alcohol or relapsing into violence. His parole plans include the support of friends and family committed to maintaining his sobriety. "[T]he Board . . . may base a denial-of-parole decision upon . . . immutable facts . . . , but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1221.) The sad facts of Crowder's late teen years will never change, but neither do they show he is still dangerous 20 years later.

Finally, Crowder's mental state and attitude do not show he is currently dangerous. He repeatedly showed remorse for shooting the victim, accepted blame for

his drunken transgressions, and acknowledged his guilt for second degree murder. He has not minimized his conduct by describing the shooting as "accidental" and "unintentional"; those layman's words are consistent with the lawyer's definition of implied malice — "act[ing] deliberately with conscious disregard for life." (*People v. Watson*, *supra*, 30 Cal.3d at p. 296.) As we noted in affirming Crowder's conviction, "one can be guilty of a murder based on implied malice with every intention that the victim *not* be harmed." (*Crowder*, *supra*, G011743, G011743.) And Crowder did not show a lack of insight by appealing his conviction for ineffective assistance of counsel and judicial misconduct. A contrary rule would reserve parole only to those who plead guilty or appeal only on "acceptable" grounds. The Legislature has not chosen to constrain parole like this. We are in no place to make such a policy choice.

In sum, not even "'"a modicum of evidence"'" justifies the Board's parole denial. (*Lawrence*, *supra*, 44 Cal.4th at p. 1205.) The court correctly granted the petition for a writ of habeas corpus.

The Order Must Be Modified

The order granting the petition was correct on the merits, but an intervening high court decision requires revision of its remedy. The court directed the Board "to hold a new hearing within 120 days of the date of this order. At that hearing, the [Board] shall find Petitioner suitable for parole, unless new evidence (i.e., evidence of behavior subsequent to the December 2008 parole hearing) is introduced which is sufficient to support the finding that [Crowder] currently poses an unreasonable risk of danger to society."

Ample authority from the Courts of Appeal supported that remedy, including the court's cited authority of *In re Palermo* (2009) 171 Cal.App.4th 1096, 1113. (Accord *In re Masoner* (2009) 172 Cal.App.4th 1098, 1110; *In re Rico* (2009) 171 Cal.App.4th 659, 689; *In re Gaul* (2009) 170 Cal.App.4th 20, 41.)

The California Supreme Court later disapproved those cases in *Prather*, *supra*, 50 Cal.4th at pages 252-253. The court held "it is improper for a reviewing court to direct the Board to reach a particular result or to consider only a limited category of evidence in making a suitability determination." (*Id*. at p. 253.) It explained, "an order precluding the Board from considering all relevant and reliable evidence when making a parole-suitability determination improperly circumscribes the statutory mandate that the Board consider *all* relevant statutory factors when making its decision, and is incompatible with our directive in *Lawrence* that evidence of suitability and unsuitability must be considered in light of the full record before the Board." (*Prather*, at p. 253.)

Such a limitation is needlessly restrictive, the *Prather* court held, because "a judicial order granting habeas corpus relief implicitly precludes the Board from again denying parole — unless some *additional* evidence (considered alone or in conjunction with other evidence in the record, and not already considered and rejected by the reviewing court) supports a determination that the prisoner remains currently dangerous." (*Prather*, *supra*, 50 Cal.4th at p. 258.) Expressly restricting the Board to consider only new evidence, in isolation, ignores the possibility "that new evidence will be probative only when viewed together with other evidence that already is part of the record (some of which may not have been contained in the record before the reviewing court), or that a review of the full record will reveal additional grounds supporting a decision to deny parole." (*Ibid*.)

Thus, the order granting the petition must be modified to delete the restriction on the Board to considering only "new evidence." Instead, the Board's prerogative can be preserved and the court's concerns satisfied by an order directing the Board to hold a new hearing "in accordance with due process of law."[3] (*Prather*, *supra*, 50 Cal.4th at p. 258.)

DISPOSITION

The court is directed to modify its order to delete the restriction: "At [the new] hearing, the [Board] shall find Petitioner suitable for parole, unless new evidence (i.e., evidence of behavior subsequent to the December 2008 parole hearing) is introduced which is sufficient to support the finding that [Crowder] *currently* poses an unreasonable risk of danger to society."

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[3] This appeal is not moot even though the parties report the Board has held another hearing limited to "new evidence" and granted parole, which the Governor has since reversed. If we dismiss this appeal as moot now and later reverse the Governor's determination, we would have to reinstate the Board's new decision granting parole. (See *Lawrence*, *supra*, 44 Cal.4th at pp. 1190, 1201, 1229; see also *In re Burdan* (2008) 169 Cal.App.4th 18, 39.) And that decision was based on an improperly circumscribed hearing. (*Prather*, *supra*, 50 Cal.4th at p. 258.) By ordering a proper hearing now, we are able to offer the Attorney General effective relief.

The court is further directed to modify the order to direct the Board to conduct the new parole hearing "in accordance with due process of law." As modified, the order is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.